

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

TESSALEE L.,

Claimant,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH No. 2006020343

**DECISION**

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California, on April 6, 2006.

Claimant was represented by her mother.

The service agency was represented by Pamela Higgins, Fair Hearing and Mediation Specialist.

The matter was submitted for decision on April 6, 2006.

**ISSUE**

The issue is whether the service agency is required to fund one session per week of in-home music therapy for claimant.

**FACTUAL FINDINGS**

1. Claimant is nine years old. She has diagnoses of mild cerebral palsy and autism. She resides with her mother. Claimant attends school in the Hayward Unified School District. According to claimant's May 2005 Individualized Education Program, the special education services being provided by the school district for the 2005-2006 school year include a special day class, one hour per week of occupational therapy, 10 hours per school year of occupational therapy consultation, two 30-minute sessions per week of speech therapy, and 30 minutes per week of adaptive physical education. Claimant is mainstreamed

for 50-minute sessions once a week in music, twice a week in both science and social studies, and four times a week in math.

2. In July 2004, claimant's mother began paying for private music therapy sessions for her daughter. She did this for several reasons: to improve claimant's fine motor skills, to help with her attention, and for socialization; claimant's mother views music therapy as "a normalizing activity" that will allow her daughter to better fit into the community and better interact with her family and other children. Claimant initially attended weekly 30-minute sessions provided by music therapist Ariel Kimball. The sessions had to be suspended for a time when claimant's mother underwent surgery. When they resumed, they were only on a bi-monthly basis for financial reasons. Kimball has recommended that claimant resume weekly music therapy sessions.

3. In January 2005, claimant's mother requested an IEP meeting to address the fact that the school district had not been providing occupational therapy and adaptive physical education as had been provided in claimant's May 2004 IEP. Claimant's mother asked the district to consider using the music therapy that her daughter was privately receiving as compensation for 24 missed adaptive physical education sessions. However, the district was unwilling to include music therapy in claimant's IEP. In August 2005, the district advised claimant's mother that it "considers that music therapy is not an intervention or accommodation that is needed in order for [claimant] to access her free and appropriate education." Claimant's mother did not appeal this action of the school district.

4. Soon after the school district declined to provide music therapy, claimant's mother requested that the service agency fund the service. Case manager Gabriel Rogin was assigned to assess the request. In October 2005, Rogin observed a music therapy session in claimant's home in order to gain an understanding of how the service benefited claimant. Two weeks later, Rogin observed claimant at school. During this observation, claimant was attentive and stayed on task. Rogin saw no problems with socialization, although claimant socialized mainly with her special day class peers.

5. In a conversation with claimant's mother on January 20, 2006, Rogin shared his concerns with her. He felt that claimant's attention issues and fine motor skills were being addressed through occupational therapy at school and he asked claimant's mother to send him an email detailing why she felt her daughter needed music therapy at home to address the same issues.

Claimant's mother responded with an email that day. She said, in part:

[Claimant] desperately needs to improve her fine motor skills.  
My reasons for providing music therapy for [her] are to this end:  
to strengthen her fingers, arms and even her back, and also  
partner her with a form of therapy that inspires her so that she  
will be willing to spontaneously practice or play an instrument  
(piano or guitar) on her own.

I believe music therapy can address [claimant's] fine motor skills on a more enduring level and strengthen her muscles more than occupational therapy can in the school setting. The reasons for this [include that] music is something that [claimant] can assimilate into her life. The occupational therapy method of strengthening [her] fingers by doing figure eights or practicing handwriting, for example, is rote, not engaging, and not something that can become a part of [her] life.

...

The school district is not sufficiently meeting [claimant's] needs as it relates to her daily living fine motor skills. . . . [¶] I have never heard [claimant] wanting to spontaneously do figure eights with me at home or any other occupational exercise. She has, however, wanted to sit at the piano and play and sing Disney songs . . . .

6. The service agency formally denied the request for music therapy on February 6, 2006, stating it would not fund one session per week of in-home music therapy because “fine motor and daily living skills should be addressed in [claimant's] IEP through the Hayward Unified School District. [The service agency] can provide educational advocacy to help ensure that these areas are adequately addressed.” Claimant's mother thereafter filed a timely appeal on her daughter's behalf.

7. The most recent occupational therapy assessment is dated May 16, 2005. Occupational therapist Zulay Torres notes that claimant has received occupational therapy services since 2000. As to fine motor skills, Torres stated that claimant “shows good fine motor skills to manipulate toys, open containers, turn knobs, pinch, and fold and tear paper and cut with scissors. Although her movements are elaborated, her skills are functional for the fine motor tasks.” In her summary, Torres wrote:

[Claimant] has received daily activities from various service providers (OT, PE and adapted PE). All of these services have a common ground: *They are all very physical and demand a lot of strength and endurance.* A variety of *sensory motor, gross motor and fine motor* activities and exercises have been incorporated on a consistent daily basis. Her endurance, core muscle strength and stability [have] significantly improved, as demonstrated by her ability to sit for longer periods and reduced “wandering” behavior which is due to fatigue from sitting.

....

*Daily suggested activities and exercises (sensory, fine and gross motor tasks) play an elemental key [in] her functional development and acquisition of new skills to support classroom work as evidenced by [claimant's] gains and progress during the past four months. Additionally, her progress is testament to the OT position that although [claimant] has Hypotonia or low muscle tone; which can not be changed with therapy, improvement is possible with consistent daily activity.*

We cannot recommend continued direct services for [claimant], as her recent improvements have been the result of the daily activities not weekly therapy. [Claimant] will continue to benefit from consistent daily support from the IEP team including home activities. Consultation continues to be the best and most effective therapy level for this student as she requires consistent, repetitive activity to enable further development and retention of skills. Without her active participation in the daily activities, she will lose gains made and possibly regress. [Emphasis in original.]

Despite Torres' recommendation that claimant receive only occupational therapy consultation services during the 2005-2006 school year, the IEP team elected to continue to provide claimant with direct therapy as well.

8. Although he believes the school district is addressing claimant's fine motor skills, Rogin recognizes that the exercises provided her by the occupational therapist are not creative or flexible enough to engage claimant. He agrees with claimant's mother that the school district is therefore "not sufficiently meeting [claimant's] needs as it relates to her daily living fine motor skills." However, he feels the solution for this is for the school district to individualize her program and curriculum in order to find a way to motivate claimant with occupational therapy exercises she will want to participate in. He has offered to attend IEP meetings and provide advocacy on claimant's behalf for an improved occupational therapy program. In fact, Rogin has already attended one IEP meeting, in December 2005.

9. In a December 2005 report, Ariel Kimball, claimant's music therapist, described how music therapy had benefited claimant. Kimball wrote:

I first began working with [claimant] in August of 2004. Her mother contacted me for music therapy based on [claimant's] love of music, and her lack of attention and fine motor skills, due to cerebral palsy. When I began teaching her, [claimant] had an attention span of approximately five minutes or less, depending on her mood. She then required a break or a different activity to shift her focus and bring her attention back. . . . In the

course of the 30-minute session, her focus was approximately 10-12 minutes total. But with a music therapist as an instructor, we were able to change activities while still maintaining the music learning and working to bring back the focus. . . . Currently, [claimant] bounces over to the piano immediately following my arrival, and focuses for 10-15 minutes before she needs a break.

Our other goal during the music sessions has been to improve [claimant's] fine motor skills; when she started playing piano, [claimant] would frequently play with single fingers on each hand, the remaining fingers and thumb curled into a fist. She would usually resist, physically and verbally, having her fingers spread and being encouraged to play with all five fingers. After the first four sessions, she was willing to try to use all her fingers, . . . [Claimant now] has much more dexterity in the center three fingers on each hand when playing the piano and prefers to use them if possible. Recently we have also begun, at [claimant's] request, to learn the guitar. This has proved frustrating, as she does not quite have the dexterity to curve her fingers around the neck of the guitar. . . . If she is going to continue living at home and learning to be independent, music therapy can help with the fine motor skills.

In summary, Kimball wrote:

Music therapy provides [claimant] with a creative outlet as well as positive means to accomplish her goals. Although it may look like an average music lesson in some ways, most music teachers do not have the specific training to work with special needs children, and don't have goals other than the learning of the songs and the correct hand positions that go with them. In music therapy, there are many goals hidden within the learning of the music, and the training to adapt the curriculum to suit the child. In [claimant's] case, her mother does play piano, and uses many of my suggestions when practicing with [claimant], but it would not be possible for this to be a parent-training situation. For [claimant], when it gets hard, she says she can't do it. [Her mother] has to listen and believe this. As an outside teacher, I can push [claimant] farther than [her mother] can, and she's more willing to try things that are difficult.

In a March 2006 addendum to her report, Kimball added a third goal to the initial goals of improving attention and fine motor skills: socialization. One new objective was for claimant to perform concerts once every two months for family members or friends,

or in scheduled recitals. “With her tendency to isolate, music is a perfect way for [claimant] to reach out and socialize with family members and friends. She enjoys performing when she is comfortable on her particular song, and socializes with the other performers, as well as relatives. This is also a very normalizing goal, . . .”

10. Kimball has seen additional improvement in claimant since her December 2005 report. For example, while claimant at that time had improved her attention and was able to stay at the piano for 10 to 12 minutes, she now often remains at the piano for the entire 30-minute session. In addition, while claimant’s frustration with being unable to curve her fingers around the guitar neck had led her to refuse more guitar lessons, after a couple of months claimant said she was willing to try again, and she has been working with the guitar for several months.

Kimball has recommended increasing the music therapy sessions from bi-monthly to weekly because she feels claimant will benefit from the more regular sessions and the structure and routine they provide.

11. Claimant’s mother views music therapy as an adjunct to the services the school district provides. The occupational therapy, speech therapy and adaptive physical education services her daughter receives are necessary for her educational requirements. She sees the music therapy as something beyond that – not only improving claimant’s fine motor skills but her socialization and attention as well. She finds that music therapy is leading her daughter into more social behaviors. In November, claimant brought her guitar to a Thanksgiving dinner and played for the guests. At Christmas, she played the piano for family members. And when a friend visited recently, claimant immediately brought out her guitar and began playing. These are behaviors she did not previously exhibit; at other family gatherings, claimant tended to isolate herself and play with her stuffed animals. Claimant’s mother believes that claimant takes pride in her music and likes to show it off to others.

Claimant’s mother has considered other means of providing claimant music lessons. But, as Kimball stated in her report, the music therapy she provides is not the same as a normal music lesson. Claimant has not been particularly successful in the school’s mainstream music program, probably because the course is not individualized to meet her learning needs and the pace is too fast for her. Similarly, claimant’s mother considered putting claimant in a beginning guitar course offered for children through Chabot College, but realized claimant does not have the attention span or the physical dexterity to be able to keep up with the pace, which would cause her to lose interest. As happened with the initial guitar lessons with Kimball, when claimant gets frustrated she just quits.

12. That using music as a teaching tool is something claimant responds to was also recognized by her adaptive physical education teacher, Diana Czekalski. In a letter written in August 2005, Czekalski wrote:

Learning new gross motor skills requires a lot of effort on [claimant’s] part. This may result in her frustration and loss of

interest. [¶] I have tried redirecting her behavior by using musical background. She responded with more enthusiasm and longer attention span. I also tried strengthening her fingers using the piano keyboard. She was focused on the exercise longer than any other activities I have done with her.

[¶] [Claimant] connects with music, a trait unique to her ability. I believe that Music Therapy is beneficial to her learning and acquiring new skills.

## LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act,<sup>1</sup> the State of California accepts responsibility for persons with developmental disabilities.<sup>2</sup> Under the act, regional centers are obligated to secure needed services and supports for consumers.<sup>3</sup> In providing needed services and supports, regional centers are enjoined not to supplant the budget of any agency that has a legal responsibility to serve the general public and that receives public funds for providing those services.<sup>4</sup>

2. Under the Individuals with Disabilities Education Act,<sup>5</sup> local educational agencies are obligated to provide a free appropriate public education (FAPE) for children with disabilities. FAPE means special education and related services.<sup>6</sup> “Related services” are defined as “such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education . . . .”<sup>7</sup> Music therapy has been recognized as such a related service under IDEA.<sup>8</sup>

3. The service agency contends that it is not required to provide music therapy services for claimant because the Hayward Unified School District is required to provide this service under IDEA; therefore, if the service agency were to fund music therapy services it would be supplanting the budget of another public agency that is legally obligated to provide

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<sup>1</sup> Welfare and Institutions Code section 4500 et seq.

<sup>2</sup> Welfare and Institutions Code section 4501.

<sup>3</sup> Welfare and Institutions Code section 4648, subdivision (a)(1).

<sup>4</sup> Welfare and Institutions Code section 4648, subdivision (a)(8).

<sup>5</sup> 20 U.S.C. § 1400 et seq.

<sup>6</sup> 20 U.S.C. § 1401(9).

<sup>7</sup> 20 U.S.C. § 1401(26).

<sup>8</sup> *Winkelman v. Parma City School District* (N.D. Ohio 1995) 411 F.Supp.2d 722, 2005 U.S. Dist. LEXIS 40624, pp. 28-29.

the service, something that is specifically forbidden under Welfare and Institutions Code section 4648, subdivision (a)(8).

4. In its denial of claimant's request for music therapy, the service agency wrote that claimant's "fine motor and daily living skills should be addressed in [her] IEP" with the school district. The specifics of this denial may have been in response to claimant's mother's email of January 20, 2006, in which she explained her view that the exercises provided by the school district's occupational therapist were "not sufficiently meeting [claimant's] needs as it relates to her daily living fine motor skills." Claimant's case manager at the service agency agreed with claimant's mother's view. But that the parties in this proceeding agree that the exercises provided by the school district's occupational therapist are not satisfactorily meeting claimant's needs does not prove that this is true. The school district, which is not a party to the proceeding, apparently feels otherwise. In fact, in her May 2005 report the occupational therapist wrote that claimant's fine motor skills were "good" and "functional," and she recommended that claimant stop receiving direct occupational therapy services. Simply because claimant does not like the exercises provided by the occupational therapist and resists doing them does not mean the district is not meeting her needs in this regard.

5. As claimant's case manager pointed out, if the services currently being provided by the school district do not meet claimant's needs, the solution is for the school district to individualize claimant's program and curriculum in order to find a way in which to meet those needs. This may or may not involve music therapy. Although music therapy is a related service under IDEA, the school district must provide it only if claimant needs the service to receive educational benefits.<sup>9</sup> Because the evidence in this proceeding did not show that music therapy is required for claimant to receive educational benefits, it cannot be found that the school district is obligated to provide the service. It follows, therefore, that it cannot be found that if the service agency were to provide music therapy it would be supplanting the budget of another public agency. Welfare and Institutions Code section 4648, subdivision (a)(8), does not serve as a basis to deny claimant's request for music therapy.

6. Claimant's music therapy has three stated goals: to improve claimant's fine motor skills, to improve her attention, and for socialization. In the process of requesting that the service agency fund music therapy, and in the agency's denial, the parties focused mainly upon this first goal. At the hearing, evidence was also presented about the other two goals. While improving claimant's fine motor skills and attention are the goals that are most directly related to claimant's educational needs, and which therefore would arguably be the responsibility of the school district, the third goal, socialization, is one that falls squarely within the service agency's area of responsibility. Regional centers are mandated to provide an array of services "to support [a client's] integration into the mainstream life of the

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<sup>9</sup> *Winkelman v. Parma City School District*, *supra*, 411 F.Supp.2d 722, 2005 U.S. Dist. LEXIS 40624, pp. 28-29.



community” and “to approximate the pattern of everyday living available to people without disabilities of the same age.”<sup>10</sup> Included among the services a regional center is authorized to provide is “social skills training.”<sup>11</sup>

7. There can be no doubt that the music therapy claimant has been receiving has aided her socialization and allowed her to better integrate into the mainstream life of the community. At family and other events claimant no longer isolates herself to play with her stuffed animals. Instead, she now willingly plays the piano or guitar and engages with her family and peers. For claimant, music therapy has become, in part, a kind of social skills training. Thus, even though music therapy has helped meet claimant’s educational goals of increased attention and improved fine motor skills, the social skills aspect alone makes it an appropriate service to be included in claimant’s Individual Program Plan and provided by the service agency. And providing funding for music therapy would meet the legislative mandate that the services provided take into account the needs and preferences of claimant and her family.<sup>12</sup>

8. California Code of Regulations, title 17, section 54326, subdivision (d)(1), provides that regional centers shall not fund “services for a minor child without first taking into account . . . the family’s responsibility for providing similar services to a minor child without disabilities.” The service agency therefore argues that it is not required to fund music therapy for claimant because music lessons are the sort of service typically provided by parents for their children.

9. As claimant’s music therapist stated in her December 2005 report, while the therapy she provides “may look like an average music lesson in some ways,” it is not. First, the structure of the “lesson” and the teaching methods used are adapted to meet claimant’s deficits. Second, the goals of a typical music lesson are to learn to sing or play an instrument and to understand musical concepts. Claimant’s music therapy certainly has resulted in claimant’s learning to play piano and guitar. But that is not the main focus of the therapy. Music is used as a means to achieve an end: to improve claimant’s physical and mental skills, and to allow her to become more fully integrated into the community. That she will learn to play an instrument is simply an added benefit, as are the educational benefits that will accrue to claimant in increased attention and better fine motor skills. But it is found that music therapy, while akin to music lessons, is not the sort of service parents typically provide for their non-disabled children. California Code of Regulations, title 17, section 54326, subdivision (d)(1), does not serve as a basis to deny claimant’s request.

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<sup>10</sup> Welfare and Institutions Code section 4501. See also section 4646, subdivision (a).

<sup>11</sup> Welfare and Institutions Code section 4512, subdivision (b).

<sup>12</sup> Welfare and Institutions Code section 4646, subdivision (a).

10. Even though the service agency failed to establish in this proceeding that the school district has a legal obligation to fund music therapy for claimant, the service agency still has an obligation to explore the possible availability of such funding.<sup>13</sup> Claimant's mother's request for music therapy from the school district through the IEP process was denied. She did not appeal this denial. The service agency has offered to provide advocacy on claimant's behalf for an improved occupational therapy program. That advocacy assistance should also extend to seeking funding for music therapy by the school district, either by again seeking inclusion of the service in claimant's IEP or by appealing the denial of the previous request.

#### ORDER

Claimant's appeal of the service agency's denial of funding for music therapy under the Lanterman Act is granted. The service agency shall fund one hour per week of music therapy for claimant for a period of one year. The benefits of claimant's music therapy shall be subject to review by the Interdisciplinary Team at the end of one year.

DATED: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL C. COHN  
Administrative Law Judge  
Office of Administrative Hearings

#### NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

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<sup>13</sup> Welfare and Institutions Code section 4659, subdivision (a). (“[A] regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services.”)